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UNDERGROUND INJECTION CONTROL PROGRAM
MEMORANDUM OF AGREEMENT
BETWEEN THE
STATE OF NORTH DAKOTA INDUSTRIAL COMMISSION
OIL & GAS DIVISION
AND
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VIII

I. GENERAL

This Memorandum of Agreement ("MOA" or "Agreement") establishes policies, responsibilities, and procedures for the State of North Dakota Industrial Commission ("Commission"), Oil & Gas Division ("Division"), for the implementation of the Underground Injection Control ("UIC") program as authorized by Section 1425 of the Safe Drinking Water Act ("SDWA") [P.L. 93-523 as amended].

This Agreement is entered into by the Commission/Division, acting through the Chief Enforcement Officer ("CEO"), and the U.S. Environmental Protection Agency ("EPA"), acting through the Regional Administrator for EPA Region VIII. This Agreement shall be effective upon signature by both parties.

The Commission/Division is responsible for, and has authority over, all Class II injection wells in North Dakota and is responsible for administering the State program for injection wells under its jurisdiction; including, but not limited to, reports, permits, monitoring, inspections, and enforcement actions. In the course of exercising these authorities, the State agrees that the terms "pollution" and "fresh water", as used by the State, include the definitions of "endangerment" and "underground source of drinking water" ("USDW"), respectively, as contained in the SDWA.

This Agreement shall be reviewed annually as part of the annual workplan evaluation process, and may be amended, modified, or revoked.

This Agreement may be modified upon the initiative of the State or the EPA. Modifications must be in writing and must be signed by the CEO and the Regional Administrator. Modifications become effective upon signature by both parties.

This Agreement shall remain in effect as long as the State has primary enforcement authority for the UIC 1425 program in North Dakota, as authorized by the SDWA. Should the SDWA be amended to require changes to programs authorized for primacy under Section 1425, the EPA will so notify the State. The State will then submit such showings as necessary to retain primacy, should it elect to do so.

It is understood that the NDSDB will make application for, and, to the extent eligible, receive from EPA all grants provided under the SDWA. Portions of those grant monies shall be made available for use by the Commission/Division, under separate agreement between the NDSDB and the CEO.

The State shall administer the UIC 1425 program in accordance with the program submission (primacy application including modifications), the SDWA, and applicable regulations. The EPA shall, in a timely manner, inform the State of the issuance, content, and meaning of federal statutes, regulations, guidelines, standards, judicial decisions, policy decisions, directives, and any other factors which reasonably could affect the UIC 1425 program.

The State shall promptly inform the EPA of any proposed or pending modifications to laws, regulations, or guidelines, and any judicial decisions or administrative actions which might affect the UIC 1425 program and the State's authority to administer the program. The State shall promptly inform the EPA of any resource allocation changes which might affect the State's ability to administer the program.

II. DEFINITIONS

Definitions used in this Agreement shall be those definitions used in North Dakota Century Code Chapter 38-08 and Administrative Code Chapters 43-02-03 and 43-02-05. The Commission/Division and the EPA agree to mutually and promptly clarify changes in definitions and/or interpretations by which approvals or enforcement actions will be implemented.

For this Agreement, the following terms are defined as follows:

- (a) Exceptions List means a name-specific list of wells that have remained in significant noncompliance in two or more consecutive quarters and have not been returned to compliance or had a formal enforcement action taken.
- (b) Significant Noncompliance (SNC) means the final language established in a memorandum signed by Michael B. Cook, Director, Office of Drinking Water, and dated December 4, 1986.
- (c) Timely and Appropriate means that within ninety (90) days of the time an instance of SNC is identified, the delegated agency should take one of the following actions:

- (1) bring the owner and/or operator back into actual (physical) compliance through formal or informal enforcement action; or
 - (2) place the owner and/or operator on an enforcement compliance schedule to achieve future compliance; or
 - (3) initiate formal administrative or judicial enforcement action.
- (d) Underground Source of Drinking Water (USDW) means an aquifer or portion thereof which supplies water for human consumption, or in which the ground water contains fewer than 10,000 mg/l total dissolved solids (TDS) and which is not an exempted aquifer.

III. RESPONSIBILITIES

A. Sharing of Information

All information and records obtained or used in the administration of the North Dakota UIC 1425 program, including all UIC permit files, shall be available to the EPA upon request without restriction, except that any information which is subject to a claim of confidentiality shall be treated by the EPA in accordance with the EPA regulations governing confidentiality (40 CFR Part 2).

The EPA shall furnish to the State, information in its files which the State needs to implement the UIC 1425 program, subject to the EPA regulations governing confidentiality and federal provisions governing data transfer.

The State shall retain records used in the administration of the UIC 1425 program for three (3) years unless an enforcement action is pending. In that event, all records pertaining to such action shall be retained until such action is resolved or for three (3) years, whichever date is later.

B. State Reporting

The Commission/Division shall submit to the Regional Administrator, quarterly reports, which shall be due to the EPA no later than thirty (30) days after the end of the quarter. The information for these reports shall be recorded on EPA reporting forms 7520-1,2,3, and 4. The Commission/Division will keep current its well inventory data and will supply the EPA with an update upon request.

The Fourth Quarter (or Annual) Report of each year shall consist of routine quarterly report information as indicated above, supplemented with the following:

- (a) a summary of grant utilization (EPA Form 7520-5); and
- (b) an updated comprehensive inventory of Class II injection/disposal wells in North Dakota.

The Fourth Quarter (or Annual) Report shall be submitted to EPA within sixty (60) days of the end of the fiscal year.

All reports may be submitted and included with similar reports submitted by the NDS DH. Information relative to the name and address of permit applicants or permittees, and information which deals with the existence, absence, or level of contaminants in drinking water shall not be kept confidential by the State. Furthermore, any UIC program information, whether declared confidential or not, shall be available to the EPA.

C. Program Evaluation

The EPA shall conduct a periodic evaluation of the North Dakota UIC 1425 program using State reports and reviews of State program records, to determine program consistency with the State program submission, the SDWA, and applicable regulations, guidance, and policies.

This program evaluation will include, but not be limited to, a review of financial expenditures, progress toward program implementation, change in the program description, and efforts toward progress on program elements. The EPA shall submit a draft of the program evaluation to the State, for their review and comment. The State shall have fifteen (15) working days to submit comments on the draft evaluation.

D. Compliance Monitoring

The State agrees to maintain a vigorous enforcement program, including: assessing compliance by operators/owners of injection facilities; and taking timely and appropriate enforcement action in every case where such action is warranted.

If the Regional Administrator makes a determination that additional compliance inspections are necessary, he/she shall notify the CEO of such determination, and request the CEO to give the Regional Administrator adequate notice and opportunity to participate in additional compliance inspections performed by the CEO.

The Regional Administrator shall, under most circumstances, provide advance notification of inspections. Notification to the

CEO shall be either by telephone or in writing, at least seven (7) days before any such inspection. However, if an emergency exists, or for some other reason it is impossible to give advance notification, the Regional Administrator may waive advance notification to inspect a facility.

For purposes of this Agreement, the term "compliance monitoring" shall refer to all efforts associated with assuring full compliance with UIC program requirements. The State agrees to maintain procedures to receive, evaluate, retain, and investigate all notices and reports that are required by compliance schedules and program regulations.

The CEO agrees to implement inspection procedures to determine compliance or noncompliance with the applicable requirements of the UIC 1425 program. Inspections, reviews of reported data, or other methods of surveillance, shall be utilized to identify persons who have not complied with permit applications or other program requirements. Any information or data obtained for such facilities or activities shall be made available to the Regional Administrator upon request.

The CEO or his authorized representative shall conduct periodic inspections of injection facilities and activities subject to regulatory requirements. These inspections shall be performed to assess compliance with all UIC permit conditions or UIC program requirements, and includes evaluating a facility's monitoring and reporting program. Inspections shall be conducted to determine compliance or noncompliance with the permit or rule-authorized requirements, verify the accuracy of the information, submitted by operators, in reporting forms and monitoring data, and to verify the adequacy of sampling, monitoring and other methods designed to provide the information.

The Commission/Division shall also investigate information received from the public or private sectors, involving violations of the applicable program requirements. The CEO shall provide opportunity for the public to submit information on violations, and to have procedures for receiving and ensuring proper consideration of such information.

The CEO, or other authorized representative engaged in compliance monitoring and evaluation, has the authority to enter any site or premises subject to regulation, or to review and copy the records of relevant program operations where such records are kept. Any investigatory inspections initiated by the CEO shall be conducted, and monitoring (data) and other information collected, in a manner to provide evidence admissible in an enforcement proceeding or in court.

Whenever a party requests information concerning a specific injection operation and the requested information is available

from the files, that information will be provided within a reasonable time. If requested information is not available, the party to whom the request was directed shall promptly notify the requestor.

The State shall allow the EPA to routinely review State records, reports, and files relevant to the administration and enforcement of the UIC 1425 program.

E. Enforcement

The State is responsible for taking timely and appropriate enforcement action against persons in violation of program requirements, compliance schedules, technical requirements, permit conditions, and other UIC program requirements. This includes violations detected by State and/or federal inspections.

The State shall provide the public with: an opportunity to participate in the State enforcement process, including intervention by any citizen having an interest and who might be affected; and assurances that citizen complaints shall be investigated and given a written response.

Those activities determined by the Commission/Division to be in violation of the UIC 1425 program, will be handled in the following manner.

- (a) Violations discovered during field inspections will be resolved if possible by contacting the operator's field personnel at the time of the inspection. If it cannot be resolved in this manner a followup letter to the operator from the Commission/Division will be issued requesting the appropriate action be taken. Such violations will be reported on EPA Form 7520-2A whether or not said violations are resolved on-site.
- (b) Reporting violations will result in a letter and/or telephone call from one of the Commission/Division staff requesting the proper information.
- (c) Violations as in (a) or (b), above, which are not resolved in thirty (30) working days and as outlined in (a) or (b), will be addressed with a letter signed by the Commission/Division requesting the necessary action.
- (d) The Commission/Division shall identify/report all SNCs and bring said SNCs into compliance, or use its enforcement authorities to take formal enforcement action within ninety (90) days.

- (e) If a SNC has not been returned to compliance or addressed with a formal enforcement action in two (2) consecutive quarters, well-specific information on the SNC will be reported on the exceptions list.
- (f) The EPA may initiate independent enforcement action in North Dakota against the operator of wells found on the exceptions list after notice to the operator and consultation with and notice to the Commission/Division; and after failure by the Commission/Division to take appropriate enforcement action.
- (g) As outlined in North Dakota Century Code ("NDCC") Section 38-08-16, any person who violates any provision of NDCC Chapter 38-08, or any rule, regulation, or order of the Commission/Division, is subject to a civil penalty not to exceed \$12,500 for each offense, with each day's violation being a separate offense.
- (h) As outlined in NDCC Section 38-08-17 (1), whenever it appears that any person is violating or threatening to violate any provision of NDCC Chapter 38-08, or any rule, regulation, or order of the Commission/Division, the Commission/Division shall bring suit, against such person in any district court of any county where such violation occurred, to restrain such person from continuing such violation or from carrying out the threat of such violation. In such suit, the court may grant prohibitory and mandatory injunctions, including temporary restraining orders and preliminary injunctions.
- (i) Emergency situations will be handled accordingly with shut-in orders and/or civil proceedings imposed as the CEO and Commission/Division determine necessary.

The Commission/Division has Assistant Attorneys General assigned to assist with legal matters. These attorneys are accessible and will be consulted on matters of violation at the discretion of the CEO. The Commission/Division utilizes the Attorney General's Office, through the Assistant Attorneys General in the following areas:

- brief question or clarification of a legal issue or procedure;
- advisory memorandum from Assistant Attorneys General;
- informal opinion memorandum from Attorney General's Office;

- formal court actions with Commission/Division as a petitioner, respondent, or intervenor;
- act as Hearing Examiners;
- approval as to form of legal documents; and
- liaison with Attorney General's Office concerning special investigations.

The Commission/Division acknowledges that in certain instances direct Federal enforcement may take place in accordance with the 1986 amendments to the Safe Drinking Water Act. In addition to the mandatory requirements of the SDWA, the EPA will consider taking direct enforcement action in the following cases:

- (1) the Commission/Division requests EPA action;
- (2) national precedent (legal or program); or
- (3) violation of an EPA order or consent decree by an operator(s).

The Commission/Division will address instances of significant noncompliance in a timely and appropriate fashion.

The SDWA requires advance notification of States in the case of direct Federal enforcement action. In addition, the EPA Regional Administrator will notify the Commission/Division seven (7) working days before any independent EPA inspection of injection facilities.

The EPA will not normally take enforcement actions without providing prior notice to the State and otherwise complying with Section 1423 of the SDWA.

The EPA agrees to the following protocol when notifying the Commission/Division of an intended inspection or enforcement action: the Water Management Division Director will call the CEO of the Division of Oil & Gas, when a case is being considered.

F. Mechanical Integrity Demonstration

The State shall not allow any mechanical integrity tests other than those specified in the program application unless the CEO supplies the Regional Administrator with a description of the proposed test procedure that is sufficient to make a decision about its usefulness and reliability, and the Regional Administrator subsequently approves the procedure.

The tests for mechanical integrity, as shown in North Dakota Administrative Code 43-02-05-07(2), are listed in order of

preference; except that all wells, both existing, and those newly constructed or worked over, must demonstrate mechanical integrity through an initial pressure test before annulus pressure monitoring will be accepted according to the listing in North Dakota Administrative Code 43-02-05-07(2).

The procedures for determining if either a mechanical integrity test (MIT) failure or an excess injection pressure violation qualify as a significant noncompliance, are defined in UIC Guidance #58 (dated September 9, 1987). It is agreed that these procedures will be used as standard protocol for determining compliance with UIC requirements.

75% of injection wells that fail MITs, but which are not considered as a SNC, should be brought into compliance within 90 days of discovery of failure. The remaining 25% of these injection wells should be brought into compliance no later than 180 days after discovery of failure.

G. Aquifer Exemptions

An aquifer or portion thereof, which would otherwise meet the definition of USDW, may be exempted from protection under this program by the Commission/Division, if it does not currently serve as a source of drinking water and will not serve as a source of drinking water in the future (as specified in 40 CFR 146.4 and ND Administrative Code 43-02-05-03).

When an aquifer exemption is proposed in anticipation of, but prior to, a permit application, the EPA may enter into formal rulemaking, and a full ninety (90)-day review period may be needed. Objections raised by the EPA will be resolved before any aquifer exemption is issued by the Commission/Division. The Commission/Division agrees to retain indefinitely, copies of all data, reports, and other information which provides the basis for any aquifer exemption. Such information shall be provided to the EPA upon request.

H. Emergency Action

The CEO shall immediately notify the Regional Administrator by telephone, or otherwise, of any endangerment to public health resulting from the actual or threatened direct or indirect injection of fluids into the ground water of the State.

I. Notice of Public Hearings

The CEO agrees that notice of public hearings, held for the purpose of UIC program activities, will be made at least fifteen (15) days before the hearing date. Notice made by a member of the regulated community may be accepted by the CEO provided that such notice is equivalent to that which would be given by the

CEO.

Notice shall be given by the Commission/Division by publishing it in a newspaper having general circulation in the local area of the activity, and by the operator by sending it certified mail (return receipt requested) to all surface landowners in the area.

J. Independent EPA Powers

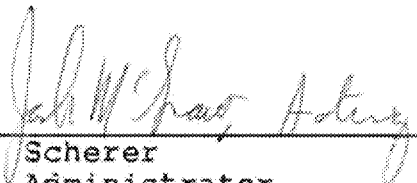
Nothing in this Agreement shall be construed to limit the authority of the EPA to take action pursuant to Sections 1421, 1422, 1423, 1424, 1425, 1431, or other sections of the SDWA. Nothing in this agreement shall prevent inspections by authorized Federal or State agencies for purposes of enforcement of other Federal laws not pertaining to Class II injection wells other than those covered by this agreement.



Wesley D. Norton
Chief Enforcement Officer
North Dakota Industrial Commission

8-24-89

Date



James J. Scherer
Regional Administrator
Region VIII
U.S. Environmental Protection Agency

9/1/89

Date

NORTH DAKOTA INDUSTRIAL COMMISSION

OIL AND GAS DIVISION

Wesley D. Norton
DIRECTOR

F. E. Wilborn
ASSISTANT DIRECTOR

Clarence G. Carlson
GEOLOGIST

Charles Koch
ENGINEERING DEPT

Doren Dannewitz
FIELD SUPERVISOR

Glenn Wollan
RECLAMATION SUP

MEMORANDUM

TO: Recipients of North Dakota Oil and Gas Rules and Regulations

FR: North Dakota Industrial Commission
Oil and Gas Division

DT: September 12, 1994

RE: Revised pages for North Dakota Statutes and Rules for the
Conservation of Oil & Gas Effective May 1, 1994

Enclosed please find the following:

- 1) List of Commission Members and Oil and Gas Division Personnel
(Revised phone numbers).
- 2) Revised Index and pages 1,2; 3,4; 9,10; 21,22; 27,28; 29,30 for
the North Dakota Century Code.
- 3) Revised Form 2.
- 4) Revised Form 15.

Please replace the enclosed pages in your rule book.

UNDERGROUND INJECTION CONTROL PROGRAM

ATTORNEY GENERAL'S STATEMENT

I hereby certify, pursuant to the provisions of Part C of the Safe Drinking Water Act (42 U.S.C. 300f et seq., as amended) and 40 CFR 123.5 (a), that in my opinion the laws of the State of North Dakota provide adequate authority to apply for, assume and carry out the program set forth in the Program Description submitted by the North Dakota Industrial Commission for Class II wells. The specific authorities provided, which are contained in lawfully enacted statutes or promulgated regulations which will be in full force and effect on the date of approval of this program include the following:

1. Prohibition of Unauthorized Injection
Federal law prohibits any underground injection unless authorized by permit or rule (Section 1421 (b) (1) (A) of the Safe Drinking Water Act (SWDA) and 40 CFR 122.33)

State Statutory and Regulatory Authority

North Dakota Century Code 38-08-04

North Dakota Administrative Code 43-02-05-04

Remarks of Attorney General

Section 38-08-04 (2), N.D.C.C. grants the Industrial Commission the authority to regulate secondary recovery operations and disposal of salt water and oil field wastes. Pursuant to this authority the Commission has promulgated regulations governing underground injection (Chapter 43-02-05, N.D.Admin. Code). Underground injection as defined in N.D.Admin. Code 43-02-05-01(2) includes all Class II wells as defined in the Code of Federal Regulations. N.D.Admin. Code 43-02-05-04 (1) provides that no underground injection may be conducted without first obtaining a permit from the North Dakota Industrial Commission. N.D.Admin. Code 43-02-05-04 (5) prohibits construction of an underground injection well prior to the issuance of a permit.

2. Prohibition of Endangering Drinking Water Sources
 - a. State authority, which provides authorization of underground injection by permit, shall require that the applicant for a permit to inject must satisfy the State that underground injection will not endanger drinking water sources (Section 1421 (b) (1) (B) (i)).

State Statutory and Regulatory Authority

North Dakota Administrative Code 43-02-05-04(4)

North Dakota Administrative Code 43-02-05-01 (3)

Remarks of Attorney General

N.D.Admin. Code 43-02-05-04 (4) requires that before a permit for underground injection is issued, the applicant must demonstrate to the Industrial Commission that the proposed injection well will not endanger any underground source of drinking water (USDW). "Underground source of drinking water" as defined by N.D.Admin. Code 43-02-05-01 (3) is virtually identical to the Federal definition. The definition of U.S.D.W. is also consistent with Commission statutory responsibility in Section 38-08-04(1)(c) to prevent "pollution of freshwater supplies".

- b. The SDWA requires that a State program, in the case of a program which provides for authorization by rule, include the prohibition that no rule may be promulgated which authorizes any underground injection which endangers drinking water sources within the meaning of Section 1421 (d) (2) (Section 1421 (b) (1) (B) (H)).

State Statutory and Regulatory Authority

North Dakota Administrative Code 43-02-05-04(9)

Remarks of Attorney General

N.D. Admin. Code 43-02-05-04(9) provides that all injection wells permitted before the effective date of N.D. Admin. Code chapter 43-02-05 shall be deemed to have a permit for purposes of that chapter, but such wells are still subject to all other requirements of the chapter. The Commission could not promulgate a rule that would endanger drinking water sources without violating its statutory responsibility to protect fresh water supplies from pollution. The regulation adopted by the Commission governing permitting, permit by rule, and area permits are at least as

stringent as the regulations promulgated by the Environmental Protection Agency.

3. Prohibition of Movement of Fluid into a USDW
 - a. The Federal program at 40 CFR 122.34 (a) (1) requires State programs to prohibit any authorization of an underground injection by permit or rule, that causes or allows movement of fluid into a USDW, for Class I, II or III wells.

State Statutory and Regulatory Authority

North Dakota Administrative Code 43-02-05-02

North Dakota Administrative Code 43-02-03-02

Remarks of Attorney General

N.D. Admin. Code 43-02-05-02 states that underground injection that causes or allows movement of fluid into an underground source of drinking water is prohibited unless the underground source of drinking water is an exempted aquifer. "Exempted aquifer" as defined in N.D. Admin. Code 43-02-05-03 is identical to the Federal definition.

- b. For Class IV or V wells, the Federal program requires State programs to prohibit any authorization by rule or permit that causes or allows movement of fluid containing any contaminant into underground sources of drinking water, if the presence of that contaminant may cause a violation of any primary drinking water regulation or may otherwise adversely affect the health of persons (40 CFR 122.34 (a) (2)).

State Statutory and Regulatory Authority

Remarks of the Attorney General

Not applicable to Class II wells.

- c. Corrective action must be imposed if any such movement is occurring from any Class I, II or III well. (40 CFR 122.34 (b), and 122.44).

State Statutory and Regulatory Authority

North Dakota Administrative Code 43-02-05-10

Remarks of Attorney General

N.D. Admin. Code 43-02-05-10 states that if there is movement of injection or formation fluids into an underground source of drinking water the Commission shall prescribe any measures as are necessary to prevent such movement.

- d. For Class V wells, the Director must take action in accordance with 40 CFR 122.34 (c) and (d).

State Statutory and Regulatory Authority

Remarks of the Attorney General

Not applicable to Class II wells.

4. Authority to Issue Permits or Rule
The SDWA requires State authority to issue permits or promulgate rules for underground injection not less stringent than regulations of the Environmental Protection Agency (Section 1422 (b) (1) (A) (i) and 40 CFR Parts 122, 123, 124, and 146).

State Statutory and Regulatory Authority

North Dakota Century Code 38-08-04

Remarks of Attorney General

Pursuant to N.D.C.C. 38-08-04 the Industrial Commission has authority to promulgate rules and issue permits governing underground injection by Class II wells. There are no statutes preventing such regulations or permits from being at least as

stringent as the regulations promulgated by the Environmental Protection Agency.

5. Authority to Condition Authorized Injection Activities

The SDWA requires State authority to condition permits in accordance with conditions applicable to all permits (40 CFR 123.7 (a) (1) through (a) (17), §§ 122.41 and 122.42).

State Statutory and Regulatory Authority

North Dakota Administrative Code 43-02-05-04 (2)

Remarks of Attorney General

N.D.A.C 43-02-05-04 (2) provides that permits may contain such terms and conditions as the Industrial Commission deems necessary. This authority would encompass any permit conditions required under the Federal regulations. Permits can be transferred only with approval of the Industrial Commission.

6. Authority to Impose Compliance Evaluation Requirements

a. THE SDWA requires the State to have authority for entry in or onto a site or facility for the purpose of inspections (Section 1421 (b) (1) (C) and 40 CFR 123.8 (c)).

State Statutory and Regulatory Authority

North Dakota Administrative Code 43-02-05-13

Remarks of Attorney General

N.D. Admin. Code 43-02-05-13 grants the Industrial Commission and its agents the authority to enter and inspect any site or facility involved with underground injection.

b. The SDWA requires State authority to conduct inspections of

facilities and activities subject to the program, and authority to require permittees and persons subject to authorization by permits or rule to conduct facility monitoring and reporting requirements in the manner prescribed by the Director (Section 1421 (b) (1) (C) and 40 CFR 146.13, 146.23, and 146.33).

State Statutory and Regulatory Authority

North Dakota Administrative Code 43-02-05-12

North Dakota Administrative Code 43-02-05-13

Remarks of Attorney General

N.D. Admin. Code 43-02-05-13 grants the Industrial Commission the authority to conduct inspections of facilities and activities subject to the underground injection control program. Pursuant to N.D. Admin. Code 43-02-05-12, the Commission also has authority to require permittees to conduct facility monitoring and reporting in the manner prescribed in the Federal regulations.

- c. The SDWA requires State authority to require permittees and persons subject to the underground injection control regulations to keep all records and make all reports required by the Director (Section 1421 (b) (1) (C) and 40 CFR 122.7 (j) (2), 122.41 (b) and 123.8).

State Statutory and Regulatory Authority

North Dakota Administrative Code 43-02-05-12

Remarks of Attorney General

N.D. Admin. Code 43-02-05-12 requires the operator of an injection well to keep accurate records and to report monthly to the oil and gas division the volume and source of the fluids injected, the injection pressure, and such other information as the commission may require. Operators are required to retain these

records for at least three years. This provision is broad enough to cover any reporting required by Federal regulations.

7. Authority for Enforcement Requirements

- a. The State agency must have authority to immediately restrain any person from engaging in any unauthorized injection that is endangering or causing damage to public health or the environment (40 CFR 123.9 (a) (1)).

State Statutory and Regulatory Authority

North Dakota Century Code 38-08-11 (3)

Remarks of Attorney General

Pursuant to N.D.C.C. 38-08-11 (3) the Industrial Commission may issue an emergency order without notice or hearing. An unauthorized injection that is endangering or causing damage to public health or environment would certainly qualify as an emergency.

- b. The State agency must have authority to sue in courts of competent jurisdiction to abate any threatened or continuing violation of any program requirement or permit condition, without the necessity of prior revocation of a permit (40 CFR 123.9 (a) (2)).

State Statutory and Regulatory Authority

North Dakota Century Code 38-08-17 (1)

Remarks of Attorney General

N.D.C.C. 38-08-17 (1) grants the Industrial Commission the authority to bring suit in district court to restrain any violation or threatened violation of any statute, rule or order. Prior revocation of a permit is not required.

c. The State agency must have authority to assess or sue to recover civil penalties and to seek criminal remedies (40 CFR 123.9 (a) (3)).

(1) Civil penalties shall be recoverable in at least the amount of \$2,500 per day. For Class II wells, if applicable, civil penalties shall be recoverable for any program violation in at least the amount of \$1,000 per day.

(2) Criminal fines shall be recoverable in at least the amount of \$5,000 per day for willful violation. For Class II wells, if applicable, pipeline (production) severance shall be impossible against any person who willfully violates any program requirement.

State Statutory and Regulatory Authority

North Dakota Century Code 38-08-16

Remarks of Attorney General

N.D.C.C. 38-08-16 provides that any person who violates any statute, rule or order is subject to a civil penalty of up to \$12,500.00 for each offense. Each day of violation is a separate offense.

d. The State Agency must have authority to assess or seek civil penalties that are appropriate to the violation (40 CFR 123.9 (c)).

State Statutory and Regulatory Authority

Remarks of Attorney General

The Industrial Commission has authority to seek civil penalties in an amount up to \$12,500.00 per day of violation. In settling an action seeking civil penalties, the Commission can consider factors such as those set out in 40 CFR 123.9 (c).

e. The State must provide for public participation in the State

enforcement process by providing either (1) authority that allows an interested party to intervene as a matter of right in any civil or administrative action (40 CFR 123.9 (d) (1)), or (2) assurance that the State agency will follow the procedures of 40 CFR 123.9 (d) (2).

State Statutory and Regulatory Authority

North Dakota Century Code 38-08-11 (6)

North Dakota Century Code 38-08-17 (2)

North Dakota Century Code Chapter 32-40

Remarks of Attorney General

North Dakota law provides for public participation in the enforcement process on both the administrative and district court levels. N.D.C.C. 38-08-11 (6) provides that any interested person may initiate an enforcement action before the Industrial Commission. N.D.C.C. 38-08-17 (2) provides that any person adversely affected by a violation of Chapter 38-08, N.D.C.C. may request the Industrial Commission to bring suit to enjoin the violation. If the Commission fails to bring suit within ten day after receipt of the request, the person making the request may bring suit in his own behalf to restrain the violation. The Environmental Law Enforcement Act, Chapter 32-40, N.D.C.C., also permits any person aggrieved by the violation of any environmental statute to bring suit to enforce the statute or collect damages, or both.

8. Authority for Public Participation in Permit Processing

The Federal program requires State authority to allow for adequate public involvement and participation in permit processing, including draft permits (if applicable), public comment, public hearing (if applicable), and response to comments on the final permit (§ 123.7 (a) (18) through (21)).

State Statutory and Regulatory Authority

North Dakota Century Code 38-08-11 (2)

Remarks of Attorney General

Pursuant to N.D.C.C. 38-08-11 (2), the Industrial Commission cannot issue a permit without a public hearing upon ten days notice.

9. Authority to Apply Technical Criteria and Standards for the Control of Underground Injection not less stringent than 40 CFR Part 146 (Section 1421 (a) (1) and (b) (1)).

State Statutory and Regulatory Authority

North Dakota Administrative Code 43-02-05-06

North Dakota Administrative Code 43-02-05-07

North Dakota Administrative Code 43-02-05-08

North Dakota Administrative Code 43-02-05-09

North Dakota Administrative Code 43-02-05-10

North Dakota Administrative Code 43-02-05-04 (2)

Remarks of Attorney General

Pursuant to N.D. Admin. Code 43-02-05-06 (Construction Requirements), N.D. Admin. Code 43-02-05-07 (Mechanical Integrity), N.D. Admin. Code 43-02-05-08 (Plugging and Abandoning Injection Wells), N.D. Admin. Code 43-02-05-09 (Operating Requirements), and N.D. Admin. Code 43-02-05-10 (Corrective Action), the Industrial Commission has authority to apply technical standards at least as stringent as the criteria at 40 CFR Part 146. Furthermore, the Commission can include technical

standards as permit conditions as provided in N.D. Admin. Code 43-02-05-04 (2).

10. Classification of Injection Wells

- a. The State must have the authority to regulate all classes and types of wells as required for an underground injection control program (Section 1421 (a) (1) and (b) (1), and 40 CFR 122.32).

State Statutory and Regulatory Authority

North Dakota Administrative Code 43-02-05-01 (1)

Remarks of Attorney General

The Industrial Commission has authority to regulate all Class II wells pursuant to N.D. Admin. Code 43-02-05-01 (1) which defines underground injection to include all Class II wells as that term is defined in the Federal regulations.

11. Elimination of Certain Class IV Wells

Not applicable to Class II wells.

12. Authority to Identify Aquifers that are Underground Sources of Drinking Water (USDW) and to Exempt Certain Aquifers (40 CFR 123.7 (c) (4), 122.35, 122.3, and 123.4 (g) (8) and (9)).

State Statutory and Regulatory Authority

North Dakota Administrative Code 43-02-05-02

North Dakota Administrative Code 43-02-05-03

Remarks of Attorney General

The provisions for exempting aquifers contained in N.D. Admin. Code 43-02-05-02 and N.D. Admin. Code 43-02-05-03 are

essentially identical to the Federal regulations. The aquifer exemption contained in those sections applies only to Class II wells.

13. Authority Over Federal Agencies and Persons Operating on Federally Owned or Leased Property

The SDWA requires that the State program must apply to underground injection by Federal agencies and to any underground injection by any other person whether or not occurring on property leased or owned by the United States (Sections 1421 (b) (1) (D) and 1447 (b)).

State Statutory and Regulatory Authority

North Dakota Administrative Code 43-02-03-07

Remarks of Attorney General

Section 38-08-02(10), N.D.C.C. defines person as "Person means and includes any natural person, corporation, association, partnership, receiver, trustee, executor administrator, guardian, fiduciary, or other representative of any kind, and includes any department, agency, or instrumentally of the state or of any governmental subdivision thereof; the masculine gender, in referring to a person, includes the feminine and the neuter genders".

While the definition of "person" does not mention agencies of the federal government, the Commission does not interpret "means and includes" as limiting the definition of "person" to those entities specifically enumerated. The Commission has consistently exercised jurisdiction over federal agencies and lands and has

treated them the same as private parties in all respects (except no fee is charged for drilling permits on federal lands).

N.D. Admin. Code 43-02-03-07 recognizes that there is concurrent jurisdiction between the state and federal governments on federal land and therefore requires all persons operating on federal land to comply with state statutes and regulations that are not in conflict with federal regulations. In no case has an exception from state regulation been requested or needed because of conflicting federal regulation.

14. State Authority over Indian Lands
When the State asserts authority over activities on Indian lands, the State authority must demonstrate it is able to regulate those activities within the State, and give an appropriate analysis of the State Authority (§123.5(b)).

State Statutory and Regulatory Authority

Remarks of Attorney General

For the purposes of this program the State is not asserting jurisdiction over Indian lands within established Indian Reservations. It should be pointed out, however, that the Commission has always exercised jurisdiction over oil and gas activities on Indian lands in North Dakota including underground injection. If an agreement can be reached with the Environmental Protection Agency and the appropriate Tribal authorities, the Commission would prefer to continue regulating underground injection on Indian Reservations.

15. Authority to Revise State Underground Injection Control Programs
(Section 1422 (b) (1) (B) and 40 CFR 123.13).

State Statutory and Regulatory Authority

Remarks of Attorney General

The Industrial Commission has authority to make revisions such as those mentioned in 40 CFR 123.13.

16. Authority to make and keep Records and make Reports on its Program Activities, all as prescribed by the Environmental Protection Agency (Section 1422 (b) (1) (A) (ii), and 40 CFR 123.6 (b) (3), 123.10, and 122.18).

State Statutory and Regulatory Authority

Remarks of Attorney General

N.D. Admin. Code 43-02-03-10 gives the Industrial Commission the authority to cooperate with Federal agencies. This authority would include record keeping and reporting as prescribed by the Environmental Protection Agency.

17. The State must have authority to make available to EPA upon request, without restriction, any information obtained or used in the administration of the State program, including information claimed by permit applicants as confidential (40 CFR 123.10).

State Statutory and Regulatory Authority

North Dakota Administrative Code 43-02-05-13

Remarks of Attorney General

All information obtained pursuant to Chapter 43-02-05, N.D. Admin. Code is public information and is available to the Environmental Protection Agency.

18. Certification of Status as Independent Legal Counsel

The undersigned attorney does hereby certify that pursuant to the laws of the State of North Dakota he is counsel for the North Dakota Industrial Commission, having full legal authority to independently represent the Industrial Commission in court in all matters pertaining to the State program described herein within the terms and conditions of 40 CFR 123.5.

Douglas L. Johnson

Assistant Attorney General